88-1903

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ARTHUR A. GOLDBERG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, under this Court's decision in *Midland Asphalt Corp.* v. *United States*, No. 87-1950 (March 28, 1989), the district court's finding that every member of petitioner's charging grand jury had a financial stake—estimated by another judge of that court to be as high as several thousand dollars per family—in voting to indict him demonstrates "a defect [in that grand jury] so fundamental that it . . . gives rise to the constitutional right not to be tried . . . ," and thus makes the district court's denial of petitioner's motion to dismiss the indictment subject to immediate appellate review?

PARTIES TO THE PROCEEDING

Petitioner, Arthur A. Goldberg, is a defendant in the district court, and was the defendant-appellant in the court of appeals. The United States of America, respondent here, is the plaintiff in the district court, and was the plaintiff-appellee in the court of appeals.

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ARTHUR A. GOLDBERG,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Arthur A. Goldberg petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered in this case on February 23, 1989.

OPINIONS BELOW

The order of the court of appeals summarily dismissing petitioner's appeal for lack of jurisdiction (App. 1a) is unreported. The court of appeals issued no opinion in support of that order. The memorandum and order of the district court denying petitioner's motion to dismiss his indictment due to the pecuniary interest of all members of the indicting grand jury (App. 3a) is likewise unreported.

JURISDICTION

The order of the court of appeals dismissing petitioner's appeal was entered February 23, 1989. A timely petition for rehearing, styled a "motion for reconsidera-

tion," was denied on May 2, 1989. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part, that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property without due process of law; . . .

28 U.S.C. § 1291, provides, in relevant part, that:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

STATEMENT OF THE CASE

A. Introduction

Petitioner Arthur A. Goldberg seeks an order granting certiorari, vacating the judgment of the Ninth Circuit, and remanding this case to that court for reconsideration in light of this Court's decision in *United States* v. *Midland Asphalt Corp.*, No. 87-1905 (March 28, 1989). Alternatively, petitioner seeks plenary review of the Ninth Circuit's decision. That decision dismissed, for lack of jurisdiction, petitioner's appeal from the district court's denial of his motion to dismiss his indictment due to the large financial stake every grand juror had in indicting him. Petitioner's motion was denied by the district court notwithstanding that court's express finding that every member of the grand jury did indeed have a pecuniary interest in indicting petitioner and that that interest did indeed disqualify them as grand jurors. (App. 3a). The court thought its denial was justified by the "rule of necessity." (App. 3a-4a).

B. Statement of Facts

On August 7, 1987, the government of Guam, in its own behalf and as *parens patriae*, commenced a civil action against petitioner and others in the District Court of Guam, seeking at least $250 million in damages. *Territory of Guam* v. *Matthews & Wright Group, Ltd., et al.*, Civil Case No. 87-00049 (D. Guam) (filed August 7, 1987). The complaint alleges, under a variety of theories, that petitioner defrauded the Territory of Guam and others in connection with the issuance of some three hundred million dollars in Guam Economic Development Authority ("GEDA") bonds. Excerpts from the complaint are included in the appendix to this petition at pages 25a-29a.

Considering the size of the territory of Guam, $250 million in damages is an enormous sum. In 1980, the most recent year for which statistics are available, there were 21,780 families and a total of 106,000 inhabitants on Guam. *See* U.S. Bureau of Census, Nos. 1355, 1357, *reprinted in Statistical Abstract of the United States*, § 30 at 782-83 (108th ed. 1988). Hence, the amount at stake in Guam's civil suit against petitioner represents some $2,400 for each inhabitant of Guam, and an average of $11,480 per family. In 1980, the median yearly family income on Guam was only $16,203. *Id.*, No. 1359, at 784. $250 million thus equals approximately nine months' income for the average Guamanian family.

Four months later, on December 10, 1987, a fifty-two count indictment naming petitioner and another party was obtained by the United States Attorney for the Districts of Guam and the Northern Mariana Islands, and was filed in the United States District Court for the Territory of Guam. Excerpts from the indictment are included in the appendix to this petition at pages 30a-39a. The charges in the indictment, various crimes allegedly committed in connection with the GEDA bond offerings,

were predicated on the same alleged facts as the causes of action in Guam's civil complaint against petitioner. *See* App. 30a-39a. The connection between the two cases was not lost on the grand jurors who indicted petitioner, who were demonstrably concerned for their own economic well-being. The prosecutor conducting the grand jury made sure of that by specifically informing the grand jurors of the existence of the civil suit. *See* App. 21a-24a.

The grand jurors, however, needed no prodding; they themselves emphasized their financial interest in the case. One grand juror asked:

> GRAND JUROR: *We'll be liable only for—we will not be*—what you call this, they won't expect this GEDA to let any more bonds in the future, right?
>
> WITNESS: GEDA will probably not be able to issue any bonds. In addition to that, the bondholders, if the bonds are declared taxable for the same reason, bondholders would have to pay the federal government taxes on all the money that they thought was tax exempt. And they will come back and they'll sue the underwriter and the issuer, probably the trustee, maybe some of the developers.
>
> GRAND JUROR: *And if GEDA loses, the taxpayer ends up paying the money, right?*

Reporter's Transcript of Grand Jury Testimony of John Zaccaro ("Zaccaro Tr."), October 22, 1987, at pp. 51-52 (emphasis added) (App. 14a).

Another grand juror ventured:

> GRAND JUROR: What benefit does Guam get out of this escrow deal? *We're* going to end up in the market now with a bad reputation.
>
> THE WITNESS: Yeah, apparently no benefit.
>
> GRAND JUROR: *We're going to get murdered.*

(Zaccaro Tr., October 23, 1987, at pp. 281-82 (emphasis added)) (App. 18a). And another grand juror asked:

"So, do you have any knowledge of where *we* stand as far as that three hundred million dollars bond is concerned?" Zaccaro Tr., October 22, 1987, at p. 77 (emphasis added) (App. 15a).

One grand juror even identified with the bond issuer, who is a named plaintiff in the civil litigation, beginning a question as follows: "by the time *we issue* all these bonds . . ." Zaccaro Tr., October 22, 1987, at p. 105 (emphasis added) (App. 16a). Another conceded that "*we* did know that there was an arbitrage there." Zaccaro Tr., October 22, 1987, at 80 (emphasis added) (App. 16a). Still another grand juror stated that the Internal Revenue Service's intention to consider the allegedly fraudulent bonds retroactively taxable "would just make Guam an example, you know. I'm interested in that. *This is my home. We don't want to be hurt real bad. We want to make an example [of petitioner].*" (Reporter's Transcript of the Grand Jury Testimony of Michael Joseph Montemurro, November 13, 1987, at p. 219 (emphasis added) (App. 20a)).

The indictment alleges that virtually all of the charged crimes occurred in multiple and different districts, not only in Guam. Moreover, the indictment was the product of only one of several investigations then pending in assorted United States Attorneys' offices. For example, at the same time that petitioner's indictment was returned in Guam, a grand jury in the Southern District of New York was investigating the same transactions that largely form the basis for the indictment here. *See* App. 23a-24a. Nevertheless, the government affirmatively chose to seek petitioner's indictment in the one district where every grand juror was known to have a large and direct finanical stake in his indictment. Not surprisingly, the government obtained the indictment it sought.

On February 2, 1988, petitioner filed motions to recuse the District Court Judge and for a change of venue. On February 19, 1988, the Honorable Cristobal C. Duenas,

Judge, United States District Court for the Territory of Guam—the only judge permanently assigned to that court —recused himself from hearing the case. On July 11, 1988, the Honorable A. Wallace Tashima, a Judge of the United States District Court for the Central District of California, sitting by designation as Judge in the United States District Court for the Territory of Guam, transferred venue from Guam to the Central District of California. (App. 5a). In his memorandum order, issued after a full evidentiary hearing, Judge Tashima found:

> [D]efendant, along with others including his firm Matthews & Wright, has been sued in a civil action seeking $250 million in damages, based on the same alleged wrongdoing charged in this criminal action. This action is brought on behalf of the people and government of Guam. *Unquestionably, the outcome of this action will have an important bearing on the civil case.*
>
> * * * *
>
> *In turn, the outcome of the related civil action will have a direct impact on the tax burden of every citizen of the territory.* It is estimated that the impact could be as high as *several thousand dollars per family.* Thus, *all potential jurors in the district have a direct pecuniary interest in the outcome of the case.*

(App. 7a) (emphasis added).

On January 17, 1989, petitioner moved to dismiss his indictment due to the financial bias of the charging grand jury. Petitioner's motion cited Judge Tashima's finding of the "direct pecuniary interest" of "*all* potential jurors," and noted that that finding applied equally to every member of the charging grand jury, since those grand jurors were drawn from precisely the same pool that would supply the petit jurors. Petitioner also offered thorough documentation of the pecuniary bias of the particular grand jurors who voted his indictment.

In a memorandum and order dated January 30, 1989, issued without benefit of oral argument or government response, the district court denied that motion. The court expressly agreed that "all members of [th]is grand jury are disqualified by reason of having a pecuniary interest in the outcome of this prosecution." (App. 4a). But it nevertheless refused to dismiss the indictment. The court reasoned that "[s]ince all members of the grand jury are disqualified by reason of having a financial stake in the outcome of this prosecution and there is no alternative by which an indictment can be issued except by other citizens of Guam similarly disqualified, the role [sic] of necessity is applicable." (App. 4a) (emphasis added). The district court's memorandum ignores the fact that virtually every count of the indictment charges acts allegedly committed in multiple and different districts, in none of which are potential grand jurors "similarly disqualified." *See* App. 30a-39a. The district court did not inquire whether a non-interested Guamanian grand jury could have been assembled—one composed of military dependents, for example. Nor did the district court even explore whether cautionary instructions or *voir dire* of potential grand jurors could have been used to reduce the obvious prejudice to petitioner.

On January 31, 1989, petitioner filed a timely notice of appeal from the district court's order. On February 23, 1989, before receiving either side's brief on the merits, the United States Court of Appeals for the Ninth Circuit *sua sponte* dismissed the pending appeal for lack of jurisdiction. The court filed no opinion in support of its order. On March 8, 1989, petitioner filed a timely petition for rehearing, styled a "motion for reconsideration." Petitioner's motion argued that appellate jurisdiction did exist under then-applicable Ninth Circuit precedent, and urged the Court to set the case for a hearing on its merits.

On April 25, 1989, petitioner filed a "supplemental motion for reconsideration," based on this Court's decision in *Midland Asphalt Corp.* v. *United States*, No. 87-1905 (March 28, 1989). In that supplemental motion, petitioner argued that *Midland Asphalt*—issued after the Ninth Circuit's February 23 order dismissing his appeal—effectively mandates immediate appellate review of the validity of an indictment issued by a grand jury found to be financially interested in the outcome of the prosecution; such a financial stake is "a defect so fundamental that it causes the grand jury no longer to be a grand jury" within the meaning of this Court's precedents. *Id.*, slip op. at 8. Nevertheless, on May 2, 1989 the Ninth Circuit denied rehearing or reconsideration in a two-sentence order that did not discuss or cite petitioner's supplemental motion or even *Midland Asphalt* itself. Instead it cited as authority a Ninth Circuit case that had actually been disapproved by *Midland Asphalt*—*United States* v. *Dederich*, 825 F.2d 1317 (9th Cir. 1987).[1] Thus, the court of appeals held that "[a]ppellant's claims on appeal do not fall within the ambit of *United States* v. *Dederich*, 825 F.2d 1317 (9th Cir. 1987)."

The Ninth Circuit apparently treated petitioner's supplemental filing as an entirely separate motion. And in another two-sentence order filed May 17, 1989, it denied reconsideration in light of *Midland Asphalt*. As it had previously done in its order of May 2, the court summarily denied petitioner's request without any discussion or opinion.

Trial is currently scheduled for June 20, 1989.

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[1] *United States* v. *Dederich*, 825 F.2d 1317, 1322 (9th Cir. 1987), expressly followed *United States* v. *Benjamin*, 812 F.2d 548 (9th Cir. 1987), which was expressly disapproved in *Midland Asphalt*. *See* slip op. at 3 n.1.

REASONS FOR GRANTING THE WRIT

I. The Lower Court's Decision Conflicts With This Court's Decision In *Midland Asphalt*

The Ninth Circuit's order dismissing petitioner's appeal is in direct conflict with *Midland Asphalt*. That case held that "a defect so fundamental that it causes the grand jury no longer to be a grand jury . . . gives rise to the constitutional right not to be tried" and thus entitles a defendant to immediate appellate review of the denial of a motion to dismiss his indictment. *Midland Asphalt*, *supra*, slip op. at 9.[2]

If there is any "defect so fundamental" to a grand jury as to cause it "no longer to be a grand jury," then a direct financial stake in returning an indictment must surely be such a defect. The purpose of the Grand Jury Clause of the Fifth Amendment is to urovide a buffer "to stand between the prosecutor and the accused and to determine whether the charge was founded upon creditable testimony or was dictated by malice or personnel ill will." *Hale* v. *Henkle*, 201 U.S. 43, 59 (1906). The grand jury is "a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). Thus, it has long been settled that a grand jury's predisposition to return an indictment denies an accused his fundamental Fifth Amendment rights

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[2] *Cf. Helstoski* v. *Meanor*, 442 U.S. 500 (1979) (immediate appeal available from denial of motion to dismiss indictment under Speech or Debate Clause); *Abney* v. *United States*, 431 U.S. 651 (1977) (immediate appeal available from denial of motion to dismiss indictment under Double Jeopardy Clause); *Stack* v. *Boyle*, 342 U.S. 1 (1951) (immediate appeal available from denial of motion to reduce bail).

to indictment by an unbiased and independent grand jury and to due process of the law. *See, e.g., Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986) (voiding first degree murder conviction twenty-three years after trial because blacks were excluded from state grand jury; "when constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm."); *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (every defendant entitled to indictment by "legally constituted and unbiased grand jury"); *Ballard* v. *United States*, 329 U.S. 187, 195 (1946) (dismissing indictment and reversing conviction because women excluded from federal grand jury).[3]

Indeed, a pecuniary interest disqualifies even a prosecutor, who is an *adversary* of the accused. *See* 28 U.S.C. § 528; *United States* v. *Heldt*, 668 F.2d 1238, 1276 (D.C. Cir. 1981) (*per curiam*), *cert. denied*, 456 U.S. 926 (1982) ("If the prosecutor's personal interest as the defendant in a civil case will be furthered by a successful criminal prosecution, the criminal defendant may be denied the impartial objective exercise of . . . discretion to which he is entitled.")[4] A pecuniary interest must, therefore, disqualify grand jurors, who are most emphatically not supposed to be adversaries of the accused.

Even a small financial interest disqualifies a federal judge. 28 U.S.C. § 455(b)(4) mandates that a federal

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[3] *See also McCarthy* v. *Mayo*, 827 F.2d 1310, 1316 (9th Cir. 1987) ("[u]ndoubtedly there is a constitutional right to be indicted by a fair grand jury").

[4] The prosecutor here may have been in a similar circumstance—he may himself have shared the grand jurors' pecuniary interest. *See* App. 21a-24a.

judge "shall" be disqualified whenever he or she has "a financial interest in the subject matter in controversy," or whenever a member of his or her household has such an interest. And even absent such a statute, the Due Process Clause of the Fifth Amendment would require a similar result. Under the Due Process Clause of the Fourteenth Amendment, a state criminal conviction must be reversed when the presiding judge has a pecuniary interest in the defendant's conviction. *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (reversing judgment where mayor was both the judge responsible for levying fines and the city official responsible for raising city revenue); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (portion of mayor-judge's salary paid from fines levied). As the *Tumey* Court noted, "it certainly . . . deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him . . . ." 273 U.S. at 523. Indeed, the Due Process Clause entitles even a civil litigant to a judge without a "direct, personal, substantial and pecuniary interest' in his case. *See Aetna Life Ins. Co.* v. *Lavoie*, 106 S. Ct. 1580 (1986) (vacating civil judgment where state supreme court justice who cast deciding vote on appeal was a plaintiff in a similar pending lawsuit).

Simply put, therefore, if a defendant cannot be tried by a judge with a pecuniary interest in his case, or be prosecuted by an attorney with such an interest in his conviction, then he certainly cannot be *indicted* by a grand jury, every member of which has a considerable financial stake in his indictment. *See Joslyn* v. *Colorado*, 184 P. 375, 377 (1919) (direct financial stake may disqualify grand juror and invalidate indictment); *see generally* Beale and Bryson, *Grand Jury Law and Practice*, § 4:21 (1988).

Such a financially-compromised grand jury is no longer the buffer "between the accuser and the accused" that the Fifth Amendment requires it to be, *Wood* v. *Georgia*, 370 U.S. at 390, and is therefore no longer a true grand jury in any meaningful sense. Under *Midland Asphalt*, a defendant therefore has a right to immediate appellate review of the denial of a motion to dismiss an indictment returned by such a self-interested grand jury; otherwise, his right not to be tried at all will be irretrievably lost.

In ordering a change of venue in this case, the district court found it certain that *no* petit jury could be impaneled in Guam which would safeguard petitioner's right to a fair trial, since "*all* potential jurors in the district have a direct pecuniary interest in the outcome of the case." (App. 7a) (emphasis in original). Judge Curtis, although erroneously denying petitioner's motion to dismiss the indictment, nonetheless agreed that "*all* members of th[is] grand jury are *disqualified by reason of having a pecuniary interest in the outcome* of this prosecution." (App. 4a) (emphasis added). The Ninth Circuit was therefore presented with a substantial claim that the grand jury that indicted petitioner was not a true grand jury at all, and that petitioner therefore had a right not to be tried on the indictment it returned. Under *Midland Asphalt*, the Ninth Circuit certainly had appellate jurisdiction to hear that claim. Its holding to the contrary squarely conflicts with *Midland Asphalt*, and its judgment should therefore be vacated and the present case remanded to that court for reconsideration in light of *Midland Asphalt*.

II. The Question Is Substantial—And Evidences Further Conflicts Between The Lower Courts' Holdings And This Court's Precedents

The present case does not involve a technical, garden-variety violation of Fed. R. Crim. P. 6, due to the presence of some unauthorized person in the grand jury room

or some minor violation of grand jury secrecy. *See, e.g., Midland Asphalt, supra; United States* v. *Mechanik*, 475 U.S. 66 (1986). It does not even involve an allegation that the grand jury has violated the defendant's right against self-incrimination. *See Lawn* v. *United States*, 355 U.S. 339 (1958). Rather, it cuts to the heart of what a grand jury is all about—providing an impartial buffer between the citizen and the sovereign. It involves demonstrated, direct and substantial financial bias, against the accused, by each and every member of the grand jury that voted his indictment.

On these facts, even the *presumption* of prejudice would be sufficient to warrant dismissal of the petitioner's indictment. As this Court recently emphasized, where the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, the indictment *must* be dismissed whether or not actual prejudice has been shown, since "the nature of the violation allow[s] a *presumption* that the defendant was prejudiced, and any inquiry into harmless error would have required unguided speculation." *Bank of Nova Scotia* v. *United States*, 108 S. Ct. 2369, 2375 (1988) (emphasis added). Here, however, the grand jurors themselves manifested an *actual* financial bias on several occasions, particularly in their knowledge of the profits which would more likely accrue to the residents of Guam if petitioner were indicted. *See supra* at 4-5. These circumstances make the district court's invocation of the "rule of necessity" all the more dangerous—and all the more in conflict with this Court's precedents.

Petitioner is aware of no other grand jury case in which the "rule of necessity" has been applied at all, much less applied in order to destroy a defendant's constitutional right. On the contrary, the "rule of necessity" has traditionally been invoked to *secure* the right of access to the courts. Four of the five cases relied upon by the district court for its "rule of necessity" holding ad-

dressed only the question of whether a *judge* in a *civil case* should be disqualified if virtually all other judges would likewise be disqualified. In those cases, as the district court stated, disqualification was inappropriate, the

> [t]heory being that if disqualification operates so as to bar justice to the parties and no other tribunal is available the disqualified judge or judges may by necessity proceed to judgment.

(App. 5a) (citing 48 C.J.S. § 74). *See Evans* v. *Gore*, 253 U.S. 245 (1920) (federal judges, under rule of necessity, may decide issues concerning salary of federal judges); *Atkins* v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978), (same); *Pilla* v. *American Bar Assoc.*, 542 F.2d 56 (8th Cir. 1976); (*pro se* complaint naming most federal judges in country as defendants and alleging constitutional right to unlicensed counsel may be acted on by federal judges allegedly interested therein); *Turner* v. *American Bar Ass'n*, 407 F. Supp. 451 (W.D. Wis. 1975) (same); (cited at App. 3a-4a).

The fifth case cited by the district court is even less relevant. In *Brinkley* v. *Hassig*, 83 F.2d 351, 357 (10th Cir. 1936), the question presented was whether the Kansas State Medical Board was competent and qualified to determine whether the plaintiff's medical license should be revoked. The Tenth Circuit affirmed the trial court's finding that the "[m]embers of the board were not disqualified because they knew of [plaintiff's] methods prior to the hearing and condemned them." *Id.* at 357. In short, none of the cases cited either by the district court —or any other case of which petitioner is aware—holds or implies that the "rule of necessity" may be invoked to save an indictment returned by an otherwise biased grand jury.

Moreover, there is no good reason to sanction the district court's novel expansion of that doctrine to include

grand jurors. There is a world of difference between a judge who is a trained and experienced lawyer and professional jurist, and a financially-biased, lay grand juror who has neither the experience nor the expertise of a judge. A grand juror whose vote to indict is worth several thousand dollars to him is simply incompetent to discharge his constitutional function as buffer between accuser and accused, since his direct, financial stake in the matter makes him, in effect, a co-accuser with the government. Noone would doubt that a demonstrated offer of a bribe to a grand juror would fatally taint any indictment he returned. Yet, in practical terms, such an offer would differ little from the circumstances here.

The district court's invocation of the "rule of necessity" in an attempt to justify an indictment by a demonstrably biased grand jury thus itself conflicts with numerous precedents of this Court, including *Bank of Nova Scotia* v. *United States*, 108 S. Ct. 2369 (1988); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); *Costello* v. *United States*, 350 U.S. 359 (1956); and *Ballard* v. *United States*, 329 U.S. 187 (1946), all of which hold that an accused has an absolute *right* to an unbiased grand jury. Moreover, even if the "rule of necessity" could be applied in a criminal case the Fifth Amendment and the above cases interpreting it surely require, at a minimum, that grand jurors be questioned on their possible bias and given a cautionary instruction. No such attempt was made—or apparently even considered—in this case.

Finally, the district court's rule of necessity analysis is misguided simply on the facts of this case. The district court erroneously assumed that petitioner—whose principal place of business at all relevant times was New York City—would escape indictment unless he was indicted by *this* Guamanian Grand Jury. Thus, the district

court announced that "there is no alternative by which an indictment can be issued [in this case] except by other citizens of Guam similarly disqualified." (App. 4a). The fact, however, is that in nearly every count the indictment charges acts said to have occurred in multiple and different federal judicial districts, in many of which grand jury investigations with respect to petitioner are even now pending. *See* App. 23a-24a.[5]

CONCLUSION

The lower courts' rulings in this case are in acute conflict with this Court's recent, unanimous decision in *Midland Asphalt*, as well as with *Bank of Nova Scotia* v. *United States*, 108 S. Ct. 2369 (1988); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); *Costello* v. *United States*, 350 U.S. 359 (1956); and *Ballard* v. *United States*, 329 U.S. 187 (1946). The Ninth Circuit's judgment should thus be vacated, and the case remanded to that court for reconsideration in light of *Midland Asphalt*. Alternatively, this case presents the Court with an efficient vehicle for settling the principle that an indictment returned by a financially-biased grand jury is fatally flawed, and certiorari should be granted to give the lower court's judgment plenary review.

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[5] Under 18 U.S.C. Section 3237(a), the crimes charged are classified as "continuing offenses" for which venue is proper in *any* federal district where the "crimes" were "begun, continued, or completed." This is clearly not a case where *no* indictment could be brought in any district outside Guam. Here, as noted *supra*, grand juries were convened in The Southern District of New York and elsewhere to investigate the same transactions which largely underlie the indictment here.

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

HOWARD L. WEITZMAN *
MERRICK SCOTT RAYLE
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& SILBERT
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Los Angeles, California 90067
Counsel for Petitioner
Arthur A. Goldberg

* Counsel of Record

Dated: May 24, 1989

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-50044

DC# CR 88-782-JWC
Central California

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ARTHUR ABBA GOLDBERG,
Defendant-Appellant.

No. 89-70065

DC# CR 88-782-JWC
Central California

ARTHUR A. GOLDBERG,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

UNITED STATES OF AMERICA,
Real Party in Interest.

ORDER

[Filed Feb. 23, 1989]

Before: GOODWIN, NELSON and BRUNETTI, Circuit Judges

The petition for a writ of mandamus seeks a stay of all pretrial proceedings in the district court pending resolution of the interlocutory appeal, no. 89-50044. The petition should have been filed as a motion in the interlocutory appeal. Accordingly, the mandamus petition and accompanying papers are ordered transferred to case no. 89-50044. Case no. 89-70065 is hereby ordered closed.

Appellant's motion for a stay of all further pretrial proceedings in the district court pending appeal is denied. Appellant's motion to file the motion for a stay under seal is granted.

On its own motion, this court dismisses appeal no. 89-50044 for lack of jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR 88-0782-JWC

UNITED STATES OF AMERICA,
Plaintiff,
v.
ARTHUR A. GOLDBERG,
Defendant.

MEMORANDUM AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT DUE TO PECUNIARY INTEREST OF GRAND JURY

[Filed Jan. 23, 1989]

The defendant moves to dismiss the indictment for the reason that all the members of the grand jury, as tax payers, have a pecuniary interest in the outcome of the case as found by Judge Tashima in the context of the defendant's successful motion for change of venue. There is, however, a difference. Notwithstanding the fact that all the potential jurors are tax payers and therefore disqualified to sit on a petit jury, a trial may still go forward by a change of venue to a court where no such disqualification occurs. When an indictable offense occurs the only grand jury which can indict the accused is one comprised of local citizens, all of whom in this instance are tax payers and thus have pecuniary interests in the outcome of the case. If all such persons are disqualified there can be no grand jury and there can be no indictment. This is the typical situation for the application of the rule of necessity, which is where all are disqualified, none are disqualified. *See Evans v. Gore*,

253 U.S. 245 (1920); *Pilla v. American Bar Ass'n.*, 542 F.2d 56, 59 (8th Cir. 1976); *Turner v. American Bar Ass'n.*, 407 F. Supp. 451, 483 (W.D. Wis. 1975).

This rule has most frequently been invoked with respect to judges. Theory being that if disqualification operates so as to bar justice to the parties and no other tribunal is available the disqualified judge or judges may by necessity proceed to judgment. 48 C.J.S., § 74.

In *Brinkley v. Hassig*, 83 F.2d 351 (10th Cir. 1936), the court held:

> From the very necessity of the case has grown a rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had a disqualified member may not act, but where no such provision is made the law cannot be nullified or the doors of justice barred because of prejudice or disqualification of a member of a court or of an administrative tribunal.

See also Atkins v. United States, 556 F.2d 1028, *cert. denied*, 434 U.S. 1009 (1978).

Since all members of the grand jury are disqualified by reason of having a pecunary interest in the outcome of this prosecution and there is no alternative by which an indictment can be issued except by other citizens of Guam similarly disqualified, the role of necessity is applicable.

For the forgoing reasons defendant's motion to dismiss the indictment because of the pecuniary interest of the members of the grand jury is denied.

DATED: January 23, 1989

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

No. CR 87-56

UNITED STATES OF AMERICA,
Plaintiff,

v.

ARTHUR ABBA GOLDBERG, *et al.*,
Defendants.

MEMORANDUM ORDER RE:
(1) CHANGE OF VENUE
(2) INTERVENTION

[Filed July 11, 1988]

BACKGROUND

This is a criminal action in which defendant Arthur Abba Goldberg ("defendant")[1] is charged with participating in a scheme to defraud the Government of Guam.

Defendant was the Executive Vice President of Mathews & Wright, Inc., a New York securities underwriting firm. The indictment alleges that defendant engaged in a scheme to defraud in connection with the issuance on October 31, 1985 of $300 million in municipal bonds by the Guam Economic Development Agency, an agency of the Government of Guam. This bond issue was pro-

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[1] Frederick Mann is a co-defendant in this action. However, he has not been arraigned. (Mann is a Canadian citizen and apparently extradition proceedings are ongoing.) Determination of the pending motion is made, as it must be, only with respect to defendant Goldberg.

moted by defendant. Fraud is alleged in misrepresenting that the bonds would be tax exempt when, in fact, they were taxable; by inflating the size of the bond issue to increase the underwriter's fees; by arranging sham sales to deceive tax authorities; and by bribing the Governor of Guam so that the scheme would proceed. Defendant also is charged with falsifying feasibility studies concerning the need for housing (the proceeds of the bond issue were to be used to construct housing and the size of the bond issue was based on these studies).

The United States contends that the effect of the scheme was to damage the credit of the Territory of Guam and cost the Government of Guam millions of dollars.

I. CHANGE OF VENUE

Defendant has moved for a change of venue.[2] The motion is based on prejudice against defendant in the district, F. R. Crim. P. 21(a) and for the convenience of parties and witnesses. F. R. Crim. P. 21(b).

A. *Prejudice*

The Territory of Guam is a small island with a population of approximately 110,000-120,000. Defendant claims prejudice on two distinct grounds. The first ground claimed to justify transfer under Rule 21(a) is massive, prejudicial pretrial publicity in the territory.

It cannot be gainsayed that the events concerned with defendant's indictment and related matters—the so-called Guam bond scandal—have drawn major media interest in Guam for over two years. This interest has resulted not only from defendant's indictment and pending trial,

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[2] The motion seeks transfer to a district "within the contiguous United States." This order addresses only whether a change of venue is required and does not address the appropriate transferee forum, including whether it should be "within the contiguous United States."

but also from the related indictment and trial of Governor Bordallo and a massive civil suit filed by the Attorney General of Guam (which will be addressed separately below).

The Court has reviewed this publicity in the print, broadcast and television (video) media. It is not an overstatement to state that it has been massive and prejudicial. The Court has also reviewed the results of public opinion polls and heard the testimony of witnesses (defense attorneys' opinions on juror attitudes). Given the literally insular nature of the territory's population and its smallness in size, the Court finds that this is the exceptional case where voir dire is insufficient to protect defendant from inherently prejudicial pretrial publicity. *Rideau* v. *Louisiana*, 373 U.S. 723, 726 (1963).

In addition to the massive pretrial publicity, defendant, along with others including his firm Matthews & Wright, has been sued in a civil action seeking $250 million in damages, based on the same alleged wrongdoing charged in this criminal action. This action is brought on behalf of the people and government of Guam. Unquestionably, the outcome of this action will have an important bearing on the civil case. At the very least, if defendant is convicted, claim preclusion or issue preclusion may make it easier for the Attorney General of Guam to prevail in the civil action.

In turn, the outcome of the related civil action will have a direct impact on the tax burden of every citizen of the territory. It is estimated that that impact could be as high as several thousand dollars per family. Thus, *all* potential jurors in the district have a direct pecuniary interest in the outcome of the case. *See Tumey* v. *Ohio*, 273 U.S. 523 (1927) (disqualification of judge for pecuniary interest).

Even if one might be inclined to argue that neither ground, standing alone, was sufficient to require trans-

fer, when both grounds are combined, a change of venue is mandated. This case is in many respects similar to *Washington Public Utilities Group* v. *United States District Court*, 843 F.2d 319 (9th Cir. 1987) ("*WPPSS*"), in which the Circuit affirmed a change of venue in a civil case under similar circumstances. Here, the factors which support transfer are even stronger than *WPPSS*. The affected community (district) is much smaller, the publicity appears to have been more pervasive and the potential pecuniary interest is greater. And, while *WPPSS* was a civil case, a change of venue was granted in the related criminal case for the same reasons. *United States* v. *Fischback & Moore, Inc.*, No. CR 38-169C (W.D. Wash. Sep. 13, 1983).

The Court "is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district." F. R. Crim. P. 21(a).

B. *Convenience*

The factors to be considered on a motion to transfer under Rule 21(b) for the convenience of parties and witnesses are enumerated in *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 243-44 (1964). Defendant has made a strong showing under *Platt* that a Rule 21(b) transfer is justified. This showing is not seriously contested by the United States. Because transfer is required under Rule 21(a), it is unnecessary to examine the Rule 21(b) showing in depth. However, it will be a factor to be considered in determining the transferee forum.

C. *The Transferee Forum*

For the reasons stated above, defendant's motion for change of venue will be granted. The transferee forum remains to be determined and the parties will be granted a further opportunity to brief the issue. In doing so,

however, certain considerations should be kept in mind. First, this case is and should continue to be covered by Ninth Circuit law. Therefore, the alternative fora to be considered shall be limited to district courts within the Ninth Circuit. Second, the convenience of *both* sides shall be considered, in terms of accessible air travel and flight times. Third, because the duration of trial may impact relative convenience and hardship, both sides should indicate the probable length of their respective cases in chief.[3]

II. INTERVENTION

In addition to the instant case and the action against Governor Bordallo, a third criminal case was filed arising out of the same series of events. The defendant in the third action, Edward K. Strauss, has pleaded guilty and has agreed to cooperate with the United States. He apparently will be a prosecution witness in this case.

Strauss is an attorney. As such, he participated in the bond issue which is the subject of this case. However, it is unclear exactly in what capacity he acted and during what period. He may have been bond counsel, special tax counsel, counsel for the underwriter or counsel for the issuer or some combination of all of these simultaneously or seriately. The issue of counselling a crime or fraud also is involved. Matthews & Wright, Inc., has moved to intervene in this criminal action, for the purpose of protecting its attorney-client privilege with Strauss.[4] Although it has cited cases on the near periphery, no case squarely holds that intervention is proper in these circumstances.

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[3] These are expected to be no more than "ballpark" estimates.

[4] Defendant has moved, on similar grounds, to preclude the testimony of Strauss. This discussion addresses that motion as well. Like Matthews & Wright's motion, defendant's motion is better addressed *in limine*.

The Court has received and reviewed *in camera* all of the statements given to the United States by Strauss. If an attorney-client privilege existed, some attorney-client communications may have been included in these statements.

Whether or not intervention is the proper procedural device or terminology, the Court concludes that Matthews & Wright should have a right to a determination of their claim. The Court also concludes, however, that the motion is premature; that it should be determined at or near trial by the judge who will preside over the trial. Therefore, the motion shall remain pending, subject to further hearing as deemed appropriate by the trial judge.

IT IS ORDERED:

1. Defendant's motion for change of venue shall be granted.

2. The parties are granted 30 days within which to brief the issue of the appropriate transferee forum.

3. Watthews & Wright, Inc.'s motion for intervention is continued for hearing at a time and place to be set by the transferree judge.

Dated: Jul. 6, 1988

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge
Sitting by Designation

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-50044

DC= CR 88-782-JWC
Central California

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.

ARTHUR ABBA GOLDBERG,
Defendant-Appellant.

ORDER

[Filed May 2, 1989]

Before: GOODWIN, NELSON and BRUNETTI, Circuit Judges

Appellant's motion for reconsideration of the February 23, 1989 order dismissing this appeal is denied. Appellant's claims on appeal do not fall within the ambit of *United States v. Dederich*, 825 F.2d 1317 (9th Cir. 1987).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-50044

DC# CR 88-782-JWC
Central California

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.

ARTHUR ABBA GOLDBERG,
Defendant-Appellant.

ORDER

[Filed May 17, 1989]

Before: GOODWIN, NELSON and BRUNETTI, Circuit Judges

Appellant has filed a supplemental motion to reconsider the dismissal of this appeal based on the Supreme Court decision in *Midland Asphalt Corp. v. United States*, 109 S. Ct. 1494 (1989). The motion is denied.

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

IN THE MATTER OF A CONTINUING INVESTIGATION BEFORE THE FEDERAL GRAND JURY RE MATTHEWS & WRIGHT.

Thursday, October 22, 1987

Agana, Guam

Volume I

TRANSCRIPT OF PROCEEDINGS

BEFORE: THE FEDERAL GRAND JURY

JOHN C. ZACCARO, JR.,

called as a witness before the Federal Grand Jury, was first duly sworn and testified as follows:

FOREMAN: Will you state your full name and spell your last, please?

THE WITNESS: John Claudio Zaccaro, Junior. Z-a-c-c-a-r-o.

* * * *

[51] THE WITNESS: In Pittsburgh, Pennsylvania.

MR. O'CONNOR: There's another question right here. I think this gentleman to your right, John?

THE WITNESS: Okay. Yes.

GRAND JUROR: Can I assume—correct me if I'm wrong, okay, to my understanding now, that nobody really loses on this, right, people just made money?

THE WITNESS: Ah, —

GRAND JUROR: People, I mean they put the money in the certificate of deposit, and time period, time frame it generated the same amount that it was issued while some people made money, so nobody lost except the, the people that's made money, right, in the process?

THE WITNESS: Yeah, everybody who was involved with the deal supposedly don't lose anything. However, if it turns out that they didn't have reasonable expectation, you know, that it wasn't a real deal, then GEDA and ultimately Guam could be the losers because of the, you know, the severe penalties.

GRAND JUROR: We'll be liable for—we will not be—what you call this, they won't expect this GEDA to let any more bonds in the future, right?

THE WITNESS: GEDA will probably not be able to issue any bonds. In addition to that, the bondholders, if the bonds are declared taxable for the same reason, [52] bondholders would have to pay the federal government taxes on all the money that they thought was tax exempt. And they will come back and they'll sue the underwriter and the issuer, probably the trustee, maybe some of the developers.

GRAND JUROR: And if GEDA loses, the taxpayer ends up paying the money, right?

THE WITNESS: If GEDA loses—Well, GEDA might be judgment proof at that time. They may not have the capability of paying the bondholders if they lose the case.

The underwriter is typically the deep pocket in cases when the bondholder sues. The underwriter generally sells to the bondholders, and because the underwriter's reputation is at stake, if the bonds that he sold are declared taxable—they're not going to—they typically tell issuers and other people it's a risk free deal, because if everything goes smoothly, everybody makes money, and even if the housing, isn't built nobody loses.

MR. O'CONNOR: Unless the people need the housing?

THE WITNESS: That's another problem.

MR. O'CONNOR: Why don't we take a break here, John?

We'll take more questions, if there are some, as soon as we come back. Think about what Mr. Zaccaro has said. * * *

* * * *

[77] GRAND JUROR: When did you resign?

THE WITNESS: I resigned in the first or second week of March in 1986, probably March 14, and it was on a Friday, as I recall. Because I remember when I resigned, I told them, "Today is a convenient day to take me off the payroll," since it was the end of the pay period.

GRAND JUROR: So do you have any knowledge of where we stand as far as that three hundred million dollars bond is concerned?

THE WITNESS: No. In fact, I did work on the Guam deal for a certain portion of time, but I was taken off in the end of August, beginning of September in 1985. So I didn't even see, you know, the closing of the deal. So you know, that's why I can't describe from my personal knowledge exactly what happened at that time.

GRAND JUROR: At some places the documents said, detail where all the money went for project development and the cost of issuance, and the fees, I imagine, breakdown in great detail somewhere?

THE WITNESS: It should be in the hands of the trustee, which would be Pittsburgh National Bank.

GRAND JUROR: And he would know who got what out of the proceeds?

THE WITNESS: Yes, because they would have issued checks to these individuals. * * *

* * * *

[80] GRAND JUROR: Now the arbitrage, this, what happened here with regards to the three hundred million dollars, we did know that there was an arbitrage there, right, or that—

THE WITNESS: Yes.

GRAND JUROR: Okay. Is that illegal? That's not highly unusual is it?

THE WITNESS: It's—I can't judge whether it's legal or illegal, it depends on a lot of things; it depends mostly on the reasonable expectation test. If—

GRAND JUROR: Oh, huh-huh.

THE WITNESS: And that relates to the issuer, if the issuer has a reasonable expectation that the project is going to be built as contemplated at the time of issuance. That's a judgment that at the time the issuer will make and bond counsel will make, and the underwriter to a degree has an obligation to make a judgment about, but when you look at it after a number of years have passed, the IRS is going to look at it and make the determination as to whether or not they had that reasonable expectation at the time.

GRAND JUROR: So in this case with GEDA, there was no reasonable expectation test as we assume, or you wouldn't know that, would you?

THE WITNESS: I can't tell you whether or not that test was met. * * *

* * * *

[105] GRAND JUROR: In any case, that altogether is not collapse because somebody made money, like the money coming from the CD back to the trustee's account, they would have more than 300 million, 200 million to that through that, by the time we issue all the bonds back to the—

THE WITNESS: Oh, there would be enough money to pay the bondholders back, but if the bonds become taxable for some reason, there would not be enough money then.

GRAND JUROR: I think I understand pretty well, I just have one other question on this whole thing. The only thing that makes it work is the fact that people trust the underwriter and the bond counsel, all the other people, when the bondholder decides to buy the bond he sits down and looks at the names of the players and decides whether he's going to play. He doesn't read 45 pages of statement?

THE WITNESS: Sometimes a bondholder will do that, but in most cases the selling group for these bonds is other underwriters. * * *

* * * *

[200]

Agana, Guam; Friday, October 23, 1987; 11:00 A.M.

* * * *

(The witness John Zaccaro, having been previously duly sworn, resumed testifying as follows:)

MR. O'CONNOR: We're back in session.

Mr. Zaccaro, you're reminded of being under oath, and of the conditions under which you appear which we discussed previously.

THE WITNESS: Okay.

MR. O'CONNOR: Members of the Grand Jury, we're going to go into a new aspect of Mr. Zaccaro's testimony at this time. We're going to talk about the Commercial Bank of the Americas. Remember we had some other testimony about the Commercial Bank of the Americas, and some other matters, so this will take probably a different twist in Mr. Zaccaro's testimony. After we've gotten through that aspect of the testimony which I want to go through today, if anybody here, anybody at all, has any questions about how these bond transactions worked, I think we should take the time at that point and let Mr. Zaccaro answer any additional questions you have, because it really is important for all of you ladies and gentlemen to have clarity of your understanding before

Mr. Zaccaro leaves. He's going to go back to the United States and we won't be able to have him out here again easily without him having to make a major trip.

* * * *

[281] THE WITNESS: Yeah. It's basically unregulated in the sense that there are no filing requirements with the SEC as you would have if you were dealing with taxable instruments, instruments that are not exempt from those filing requirements.

GRAND JUROR: Do you think there should be?

THE WITNESS: Whoosh, that's a tough question. To me it goes all the way back to constitutional law, and the rights of the states to be free from federal interference in the operation of their business. I think that an idea has to come up—somebody has to come up with an idea for regulating underwriters, but I don't see a way that that can be done without hurting the states' and cities' and territories' ability to borrow money in the public markets and making it more of a problem. For example, as I said before, arbitrage serves a good purpose in the sense that issuers who don't have the financial wherewithal to plan projects can use that arbitrage to pay the cost of issuance, can use that arbitrage to do those things before they get the projects ready. But because of the abuse of the underwriters in the area the law has been changed and this is prohibited. Now what are small issuers going to do? It's a problem.

GRAND JUROR: What benefit does Guam get out of this escrow deal? We're going to end up in the market now [282] with a bad reputation.

THE WITNESS: Yeah, apparently no benefit.

GRAND JUROR: We're going to get murdered.

THE WITNESS: Unless something can happen. My suggestion is that Guam should be talking to large banks, probably Japanese banks and Chinese banks, who have the financial capability to build some housing and use a portion of the bond issue, whatever can be used,

whatever the market can absorb, and you know, work as hard as they can trying to do that, maybe find another underwriter, or a financial adviser who is capable of helping them in that respect.

GRAND JUROR: Where would we find one now?

THE WITNESS: Unfortunately it's going to be difficult. But on the other hand, I think that the perception here is that Guam has been a victim, and if someone sees the opportunity to make some money in helping Guam, and Guam is willing to view it with that and accept that, there might be some hope for building something out here, and using a portion of the bond issue, and putting this behind you.

GRAND JUROR: We may be one of only 30 victims, if any of those are ever marketed.

THE WITNESS: Yeah. Well, most of these probably have been remarketed. I don't know. I couldn't tell you.

* * * *

[——]

Grand Jury Proceedings Held On November 13, 1987

MICHAEL JOSEPH MONTEMURRO,

a witness herein called by the Grand Jury was sworn to tell the truth, the whole truth and nothing but the truth and testified as follows:

MR. MONTEMURRO: I do.

FOREMAN: Please state you full name and spell your last.

MR. MONTEMURRO: Michael Joseph Montemurro. The last name is spelled M-O-N-T-E-M-U-R-R-O.

DIRECT EXAMINATION BY MR. WILLIAM O'CONNOR:

Q Mr. Montemurro, by whom are you employed?
A Internal Revenue Service.
Q Of the United States?
A Of the United States.

Q And how long have you been so employed sir?

A Since September of 1976.

Q Do you have a title in your position there?

A I'm a Branch Chief in the Individual Tax Division.

Q And as Branch Chief in the Individual Tax Division, do you now or have you had something to do in the matters involving bonds of municipal housing and other kinds of bonds?

A Yes.

* * * *

[219] GRAND JUROR: This would just make Guam an example, you know. I'm interested in that. This is my home. We don't want to be hurt real bad. We want to make an example.

THE WITNESS: I don't know. The IRS commissioner has to make his determination as to what kind, you know.

GRAND JUROR: Well, give the message to him.

THE WITNESS: Certainly the commissioner is aware. I'll tell you that the commissioner is aware because we made him aware in a memorandum that we wrote that certainly this—if the IRS declares these bonds taxable, that will adversely affect the Guam's ability to borrow on the tax exempt mortgage for many years to come. However, speaking as an IRS person, we never the less we made the recommendation that the bonds still will be declared taxable. Even though we realize it could adversely affect the Government of Guam's ability to borrow in the future. I guess from a federal point of view, we believed that when you have transactions that were seriously violating as this, you know, the IRS has to take some sort of action to preclude this in the future. * * *

* * * *

IN THE UNITED STATES DISTRICT COURT
OF GUAM

TERRITORY OF GUAM

GRAND JURY PROCEEDINGS HELD ON DECEMBER 9, 1987.

PATRICIA T. CRUZ
OFFICIAL FREELANCE COURT REPORTER
TERRITORY OF GUAM

evidence whatsoever? Is there any knowledge of this transaction?

MR. VERNIER: Well, I can't say whether or not we have a sufficient amount of evidence. That's for you to decide. My understanding though of the indictment, in summary as given was that there is not sufficient evidence to charge anyone at PNB, the Pittsburg National Bank for an indictment at this time. Had Mr. Goldberg or Mr. Mann, say they decide—say they are indicted and they tell us that there were insiders at the Pittsburg National Bank. That there were people, then we can bring up charges, but until we have that, we can't ethically bring up an indictment.

GRAND JUROR: I have another thing. Is it true that that 100 thousand that was loaned to that architect, I think it is the position of Mr. Goldberg that it was taken from the development fund and as a matter of fact, there was a note that said that it went to Matthews & Wright and in addition to that, I think there was another 30 thousand; right? Now, how can the Government of Guam through GEDA get this back from Matthews & Wright when Matthews & Wright has nothing to do with the indictment?

MR. VERNIER: Why is Matthews & Wright not included in the indictment?

GRAND JUROR: The indictment here is only against Mr. Mann and Mr. Goldberg.

MR. VERNIER: That's right, because going back to what I said earlier, we don't at this point have any evidence that anyone in Matthews & Wright other than Mr. Goldberg was their representative as vice president had knowledge.

Now, if the Government of Guam, which has done, was to sue Matthews & Wright, you get back from them money and you get back damages from them for the damages done by the Matthews & Wright representative, they can do that. They have done that. As far as the criminal charge, we have to wait till we have evidence that the person—someone else in Matthews & Wright was aware of the criminal activity so we can propose an indictment.

GRAND JUROR: I think also that it will be a stronger case if we are going to include Matthews & Wright. Maybe they are going to step out of place.

MR. VERNIER: Well, you are talking about strategy and that is the tactics. You may be right and you may be wrong. At this point, we are submitting the indictment because personally we feel we have strong evidence at this time. If later they decide to cooperate, then later we can go after other people. Mr. Gilliam of course cooperated in the indictment against Governor Bordallo. He was named as a defendant and he decided to plead guilty. Then once he cooperated, he gave us other information concerning other people.

GRAND JUROR: What is the advantage of bargaining or discussing with the F.B.I.? What is the advantage here of taking money out of this bank and then bargains to plead guilty?

* * * *

MR. O'CONNOR: One of the problems with this investigation is that so many of the things didn't happen on Guam. We've been digging into the United States and all the different cities to find out what was going on there. It's both time consuming and we fought with alot of problems because we have a situation where the agents are all over. There are others here on Guam working on this. In the United States when Mr. Cunnane asks the agents to go out and conduct an interview with somebody there, that person hasn't had the benefit of the years of school on this problem which is what Cunnane has done and what you have done. So, it's very hard to get complete answers. What he's got going on now is probably another 30 or 40 inquiries that are ongoing in the United States. Now, some of the problems that may arise are some of them may not be things that are tied to Guam in a way that would allow that the prosecutors on Guam may turn out, for example, that a fraud will have been done that we will learn of that it didn't take place with things on Guam and didn't touch with it. Those cases we have to rule out to one of the prosecuting offices within the United States so that they can take the appropriate action. An example of that would be at the New American Federal Credit Union where a loan committee is sat upon by Mr. Goldberg and other people and where transactions—some of which you have heard here, have taken place in New Jersey where it had nothing to do with Guam. The Guam prosecuting attorney can't prosecute offenses in New Jersey. The Guam Grand Jury can't indict that. And, I hope not to have too much of your time spent in investigating things. You should know that this same matter is being investigated by the United States Attorney for the Eastern District of Missouri, the United States Attorney for the Southern District of Illinois, The United States Attorney for the District of Philadelphia, Pennsylvania. The United States Attorney for the District of New Jersey. The United States Attorney for the District of New York. Each of

them has a different approach to the problem. The New York U.S. Attorney, for example, might as I have been told is looking at the matter in a stock bond process. This is where it could be said perhaps that what was done was that the numerous transactions you've seen, the CBA transactions were done to raise the expectations of the value of the stock in the Matthews & Wright Corporation just before the stock was sold. And that would be something that took place all together in New York and not here. Other transactions that have occurred in various other places in St. Lewis and Chester, Pennsylvania and elsewhere are not within the scope here. As to local briberies, that investigation is ongoing and we are not yet certain of how much we will find there. We do not have a case to present to you of local bribery but I think we've come to a point where it's appropriate for us to present you the cases of Mann and Goldberg. And, up until this morning I had planned on asking you to consider Strauss as well. * * *

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The Territory of Guam and Guam
Economic Development Authority

IN THE DISTRICT COURT OF GUAM

TERRITORY OF GUAM

Civil Case No. 87-00049

COMPLAINT FOR DECLARATORY RELIEF; INJUNCTIVE RELIEF; ACCOUNTING; SECURITIES LAW VIOLATIONS; RICO VIOLATIONS; UNJUST ENRICHMENT; BREACH OF CONTRACT; NEGLIGENCE; MISREPRESENTATION; BREACH OF FIDUCIARY DUTY; CLAIMS OF THE TERRITORY OF GUAM AS PARENS PATRIAE; CONSTRUCTIVE TRUST

TERRITORY OF GUAM, an unincorporated territory; GUAM ECONOMIC DEVELOPMENT AUTHORITY, a public corporation,

Plaintiffs,

vs.

MATTHEWS & WRIGHT GROUP, LTD., a New York corporation; MATTHEWS & WRIGHT, INC., a New York corporation; GEORGE BENOIT; ARTHUR ABBA GOLDBERG; BERKMAN, RUSLANDER, POHL, LIEBER & ENGEL; EDWARD K. STRAUSS; LANE AND EDSON, P.C.; CHARLES L. EDSON; J.D. MOORE & CO., an Ontario corporation;

FREDERICK L. MANN; PITTSBURGH NATIONAL BANK, a Pennsylvania corporation; REAL ESTATE RESEARCH CORPORATION, a California corporation; RICHARD E. WEBB; MUNICIPAL RESOURCES: MANAGEMENT + DEVELOPMENT, a corporation; PHILIP J. KIEFFER,

Defendants.

DEMAND FOR JURY TRIAL

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* * * *

The Parties

3. One of the Plaintiffs is the Government of the Territory of Guam ("Government of Guam").

4. The second plaintiff is the Guam Economic Development Authority ("GEDA" or the "Issuer"). GEDA is a public corporation created in 1965 pursuant to Guam law. Its function was and is to assist in Guam's economic development. By Public Law 18-20 signed into law on or about October 28, 1985, the Guam Legislature (the "Legislature") approved GEDA's issuance of the bonds hereinafter described.

5. In this action, the Government of Guam sues not only in its own right, but also as representative of the People of the Territory, or the People's parens patriae. It is qualified and entitled to do so, because Defendants have interfered with its interest in the well-being of the Guam economy and the health and welfare of Guam's residents. The People's injuries are of the type that the Guam Legislature would likely address. Guam in its role as parens patriae is the proper entity to assert the claims it asserts in this action on behalf of the People.

6. The Defendants are as follows:

a. Matthews & Wright Group, Ltd. ("Group") was and is at all times herein concerned a New York corpo-

ration and owns Defendant Matthews & Wright, Inc. * * *.

* * * *

SIXTH CLAIM FOR RELIEF

(Violations of Racketeer-Influenced Corrupt Organization Act—18 USC 1961 *et seq.*)

66. Plaintiffs repeat and reallege each and every paragraph of the Common Allegations and the Fourth and Fifth Claims for Relief and incorporate the same by reference as though fully set forth hereat.

67. The Underwriter, Goldberg, Mann and J.D. Moore have participated in a pattern of racketeering activity to acquire control of GEDA's mortgage revenue-raising efforts and activities, and thereby to receive commissions and fees. Such efforts and activities substantially affect interstate commerce. The specific instances of these Defendants' racketeering activity include but are not limited to the following:

a. These Defendants have engaged in the securities fraud alleged in the Fourth Claim for Relief.

b. With the assistance of the Defendants named in this Claim, the Underwriter has obtained fees by means of false and fraudulent representations.

c. These Defendants engaged in a wire fraud scheme by which certain Government of Guam officials were paid bribes for their roles in securing GEDA's and the Legislature's approval of the Bond issue.

d. In connection with the acts and conduct alleged herein, the Underwriter, Goldberg, Mann and J.D. Moore directly or indirectly used means and instrumentalities of interstate commerce, including mails, and interstate telephone communication.

68. As a direct and proximate result of these Defendants' conduct, Plaintiffs have been damaged according to proof at trial. Plaintiffs are entitled to treble damages.

* * * *

TWELFTH CLAIM FOR RELIEF

(Parens Patriae)

92. The Governor of Guam repeats and realleges each and every paragraph of the Common Allegations and the allegations set forth in the Fourth through Eleventh Claims for Relief and incorporate the same by reference as if fully set forth hereat.

93. The acts of Defendants have resulted in a failure of the Program to provide for the housing needs of the Territory of Guam and the Government of Guam and the People of the Territory of Guam have been damaged as follows:

a. The People of the Territory of Guam continue to suffer inadequate available housing.

b. Should all or a substantial portion of the housing contemplated by this Bond issue not be constructed as originally intended then the People of the Territory of Guam will incurr increased future costs in financing and developing the housing necessary to meet the needs of the Territory of Guam.

c. Failure of the Bonds to provide adequate housing, and questions concerning the status of the Bonds, have caused damage to the general reputation of the Government of Guam and the People of the Territory of Guam.

d. The Government of Guam's ability to utilize public finance alternatives for infrastructure developments vital to the health, safety and welfare of the People of the Territory as well as the economic development of the Territory have been severly impaired.

94. Given the size, nature and structure of the Bond issue and given the Department of the Treasury's position at the time the Bonds were issued that these types of bonds would be closely scrutinized as possible arbitrage

bonds, the Defendants owed to the Government of Guam and the People of the Territory of Guam a particular duty to insure that the Bonds were properly structured so that the interest on the Bonds would be and remain tax exempt and so that the Bonds would be utilized for their intended purpose.

95. In light of all of the circumstances, it was clearly foreseeable that failure of the Bond issue to carry out its intended purpose would cause substantial damage to the Government of Guam and the People of the Territory of Guam.

96. As a direct and proximate result of these Defendants' acts as set forth in the Fourth through the Eleventh Claims for Relief, the Government of Guam, in its own right and as representative of the People of the Territory of Guam, has been injured in an amount to be proved at trial.

97. Defendants, except the Trustee, acted with oppression, fraud and malice, and the Government of Guam and the People of the Territory of Guam are therefore entitled to exemplary and punitive damages in the amount of $250 million as alleged in paragraph 86 herein.

* * * *

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IN THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

Criminal Case No. CR 87-00056

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ARTHUR ABBA GOLDBERG and
FREDERICK LLEWELLYN MANN,
aka MANFRED LOTHAR MANN, aka DR. MANN,
Defendants.

INDICTMENT

[Conspiracy to Commit ITAR Bribery]
18 U.S.C. § 371 & § 2

[Interstate Travel in Aid of Racketeering and Aiding and Abetting]
18 U.S.C. § 1952 & § 2

[Bribery Concerning Programs Receiving Federal Funds]
18 U.S.C. § 666 & § 2

[Mail Fraud]
18 U.S.C. § 1341 & § 2
[Conspiracy to Obstruct Justice]
18 U.S.C. § 371 & § 2

[Wire Fraud]
18 U.S.C. § 1343 & § 2

THE GRAND JURY CHARGES:

COUNT 1

CONSPIRACY TO COMMIT ITAR BRIBERY

18 U.S.C. § 371 & § 2

1. At all times herein relevant:

(a) Arthur Abba Goldberg, hereinafter GOLDBERG, a defendant herein, was an Executive Vice-President and a major stockholder of Matthews & Wright, Inc., a New York underwriter, hereinafter M&W.

(b) Frederick L. Mann, aka Manfred Lothar Mann, aka "Dr." Mann, hereinafter MANN, a defendant herein, was a "Municipal Finance Consultant" associated with M&W and operating in concert with M&W and GOLDBERG. "J.D. Moore & Co.," hereinafter Moore and "Mill Rate, Ltd.," hereinafter Mill Rate, are names in which MANN maintained bank accounts and under which he received various payments.

(c) The Commercial Bank of the Americas, hereinafter CBA, was controlled by MANN. CBA was incorporated in 1984 in Saipan, Commonwealth of the Northern Mariana Islands, hereinafter CNMI, as an offshore bank. Its license, which was fraudulently procured for 1984, expired at the end of 1984 and renewal was refused.

(d) Roger J. Burns, hereinafter Burns, was chief financial officer/comptroller of M&W.

(e) Peter R. Rosenblatt, hereinafter Rosenblatt, was a Washington, D.C. attorney and former federal executive.

(f) Ricardo J. Bordallo, hereinafter Bordallo, was the Governor of Guam.

(g) Guam Economic Development Authority, hereinafter GEDA, was an authority of the Government of Guam, which received more than $10,000 in federal assistance in the twelve months surrounding October 31, 1985.

(h) John Gilliam, hereinafter Gilliam, was a "Special Assistant to the Governor on Business and Economic Affairs" on the staff of Bordallo.

(i) John Whitt, hereinafter Whitt, was Chief of Staff to Bordallo.

(j) John C. Zaccaro, Jr., hereinafter Zaccaro, was an employee of M&W.

(k) Phillip J. Kieffer, hereinafter Kieffer, was a consultant who conducted business under the name of Municipal Resources: Management & Development, hereinafter MR:M+D.

(l) New American Federal Credit Union, hereinafter NAFCU, was a federal credit union in New Jersey. GOLDBERG was chief executive officer of this credit union.

(m) Pittsburgh National Bank, hereinafter PNB, was the Trustee charged with disbursing the $4.5 million Program Development Fund of the $300 million Guam Economic Development Authority, Territory of Guam multi-family mortgage revenue bonds, hereinafter the $300 million Guam bonds. The $4.5 million Program Development Fund, hereinafter the Program Development Fund or The Fund, was established by the Guam statute authorizing the issuance of the $300 million Guam bonds, from the proceeds of the sale of the bonds. Any amount left in The Fund, after authorized expenditures, was statutorily returned to Guam for infrastructure costs.

2. Beginning in or about January 1985 and continuing until the date of the return of this indictment, in the District of Guam and elsewhere, defendant MANN and defendant GOLDBERG, and Gilliam, an unindicted co-conspirator, and other uncharged co-conspirators known and unknown to the Grand Jury, did willfully and knowingly combine, conspire, confederate and agree together to:

(a) travel in interstate and foreign commerce and use facilities of interstate and foreign commerce with the intent to promote, facilitate, manage and carry on an unlawful activity, that is, the corrupt procurement of the 1985 issuance by GEDA of the $300 million Guam bonds and thereafter performed and attempted to perform bribery, in violation of the laws of the United States and the laws of the Territory of Guam, by

(i) corruptly offering a payment of $100,000 to Bordallo in September 1985;

(ii) by later raising the payment offered to $200,000;

(iii) by corruptly offering a check for $50,000 in January 1986 to Bordallo; and

(iv) by corruptly paying, in three installments, $70,000 of Bordallo gubernatorial campaign expenses in 1986, all in exchange for Bordallo's corrupt influence and official actions as Governor of Guam in connection with the issuance of the $300 million Guam bonds by GEDA on October 31, 1985.

All in violation of 18 U.S.C. § 1952 and § 666(a)(2) and Guam Crim. & Corr. Code § 49.20; § 49.30; and § 49.40.

Object of the Conspiracy

The object of the conspiracy was to give, offer, and agree to give, offer and confer, and to give and confer, something of value, that is, money to Bordallo, in exchange for his corrupt use of his influence as Governor

of Guam, in connection with the issuance and approval of the $300 million Guam bonds in order to obtain, for the defendants, control of, and payments from, proceeds to be generated by the sale of these bonds.

Overt Acts

1. On or about between late 1984 and March 12, 1985, MANN and GOLDBERG met with Rosenblatt in Washington, D.C. and elsewhere. MANN represented that he was Director of CBA; GOLDBERG said he was executive vice president of M&W.

2. On or about March 12, 1985, GOLDBERG agreed to pay Rosenblatt $1.00 for every $1,000 of bonds issued, by GEDA, in exchange for a favorable introduction by Rosenblatt to Bordallo.

3. In early March, Rosenblatt contacted Bordallo by telephone. On or about March 8, 1985, Rosenblatt in Washington, D.C. contacted Bordallo in Guam by telegraph from Washington, D.C. and praised M&W, MANN and GOLDBERG, thus introducing them to Bordallo, and requested Bordallo meet with MANN on March 13, or 14, 1985.

4. On or about March 13, 1985, MANN travelled in interstate commerce to Guam and thereafter met with Bordallo.

5. On April 4, 1985, Rosenblatt telephoned from the continental U.S. to the Governor's office in Guam and asked Whitt to convey Rosenblatt's appreciation to Bordallo for meeting with MANN.

COUNT 2

Interstate Travel in Aid of
Racketeering and Aiding and Abetting
18 U.S.C. § 1952 and § 2

1. At all times herein relevant:

(a) Arthur Abba Goldberg, hereinafter GOLDBERG, a defendant herein, was an Executive Vice-President of Matthews & Wright, Inc., a New York underwriter, hereinafter M&W.

(b) Frederick L. Mann, aka Manfred Lothar Mann, aka "Dr." Mann, hereinafter MANN, a defendant herein, was a "Municipal Finance Consultant" associated with M&W and operating in concert with M&W and GOLDBERG. "J.D. Moore & Co.," hereinafter Moore and "Mill Rate, Ltd.," hereinafter Mill Rate, are names in which MANN maintained bank accounts and under which he received various payments.

(c) Ricardo J. Bordallo, hereinafter Bordallo, was the Governor of Guam.

(d) Guam Development Authority, hereinafter GEDA, was an authority of the Government of Guam, which received more than $10,000 in federal assistance in the twelve months surrounding October 31, 1985.

(e) John Gilliam, hereinafter Gilliam, was a "Special Assistant to the Governor on Business and Economic Affairs" on the staff of Bordallo.

2. On or about September 1985, in the District of Guam and elsewhere, MANN and GOLDBERG, the defendants herein, did willfully, knowingly and unlawfully travel in interstate and foreign commerce, that is, MANN travelled in interstate and foreign commerce to Guam and there corruptly agreed with Gilliam that $100,000 would be paid for the benefit of Bordallo, if the proposed

$300 million GEDA multi-family housing bond was supported by Boardallo and issued by GEDA, with the intent to promote, manage, establish and carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, to wit: bribery of Governor Bordallo in violation of § 49.20, § 49.30 and § 49.40 of the Territory of Guam's Criminal and Corrections Code and in violation of Title 18 U.S.C. § 666 and thereafter did perform and attempt to perform acts to promote, manage, establish and carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity by transferring certain moneys in accordance with the aforesaid agreement.

All in violation of Title 18 U.S.C. § 1952 and § 2.

COUNTS 13-52

The Scheme to Commit Mail Fraud & Wire Fraud
18 U.S.C. § 1341 and § 1343 and § 2

(I.) *THE SCHEME–*

1. At all times herein relevant:

(a) Arthur Abba Goldberg, hereinafter GOLDBERG, a defendant herein, was an Executive Vice-President and major stockholder of Matthews & Wright, Inc., a New York underwriter, hereinafter M&W.

(b) Frederick L. Mann, aka Manfred Lothar Mann, aka "Dr." Mann, hereinafter MANN, a defendant herein, was a "Municipal Finance Consultant" associated with M&W and operating in concert with M&W and GOLDBERG. MANN sometimes operated under the names "J.D. Moore & Co." and "Mill Rate, Ltd.," for purposes of receiving payments. He also represented himself to be Director and Chairman of the Commercial Bank of the Americas, hereinafter CBA.

(c) Edward K. Strauss, hereinafter Strauss, was an attorney practicing in Pennsylvania.

(d) George W. Benoit, hereinafter Benoit, was Chief Executive Officer of M&W.

(e) Roger J. Burns, hereinafter Burns, was a chief financial officer/comptroller of M&W.

(f) Joseph Craven, hereinafter Craven, was a junior executive of M&W.

(g) New American Federal Credit Union, hereinafter NAFCU, was a credit union of which GOLDBERG was chief executive;

(h) Joel Schwartz, hereinafter Schwartz, was manager of NAFCU.

(i) John C. Zaccaro, Jr., hereinafter Zaccaro, was an employee of M&W.

(j) Phillip J. Kieffer, hereinafter Kieffer, was a consultant who conducted business under the name Municipal Resources: Management + Development, hereinafter MR:M+D.

(k) The U.S. Treasury Department, hereinafter Treasury Department, was charged with collecting taxes for the United States.

2. From on or about January 1984 to the date of this Indictment, in the District of Guam and elsewhere, GOLDBERG and MANN, defendants herein, acting together and aiding and abetting each other, and in concert with others not charged herein, did devise a scheme or artifice to defraud the people and the local governments of various places within and without the United States, including the Territory of Guam, hereinafter Guam, the Commonwealth of the Northern Mariana Islands, hereinafter CNMI, the Republic of Palau, hereinafter Palau, at the time part of the Trust Territory of the Pacific Islands, and various other local jurisdictions of the United States of money and property including:

- The credit of the respective local governments, a valuable property right;
- The right to issue tax-exempt municipal bonds, a valuable property right of the respective governments;
- The funds and credit of certain developers of Guam;
- The monetary benefit of certain tax exemptions to potential bondholders of municipal or local government bonds issues;
- certain funds placed in trust in the Guam Program Development Fund;

and to take and obtain and apply for their own purposes, funds generated by the sale of municipal bonds to be issued by the local governments, all by means of false and fraudulent pretenses, representations and promises inducing, recommending and fostering the underwriting and issuance of municipal bonds in such a way as to impair the apparent tax-exempt status of such bonds, when the defendants well knew at the time that the pretenses, representations and promises would be and were false when made, and which scheme to defraud and to obtain money and property is set forth more fully below.

3. It was a part of the scheme that the defandants GOLDBERG and MANN, acting in concert with others, known and unknown, not charged herein, would promote, recommend and foster the issuance of inflated amounts of municipal bonds by small, tax-exempt local issuers, such as Mariana Islands Housing Authority, hereinafter MIHA, Guam Economic Development Authority, hereinafter GEDA and the National Development Banking Corporation, Republic of Palau, by various means, including the procurement and issuance of bogus opinions as to the tax-exempt character of the bonds, knowing full well that there was no reasonable expectation of the accomplishment of the projects upon which the bonds were asserted to be based, such inflated amounts being issued for the purpose of obtaining fees and payments for GOLDBERG, M&W, and for MANN and others, all to be obtained from the moneys to be generated by the sale of the inflated amounts of municipal bonds.